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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

THE CITY OF FLINT, MICHIGAN,

Petitioner,

v.

CHARLES MIDDLETON; W. OSMUND KELLY, III; BRIAN SEPANAK; BRUCE SEPANAK; STEPHEN HILL; GREGORY DOERR, BARRY SAUNDERS; ROBERT LOREY; MAYNARD NEWMAN; JAMES McCLELLAN; and THOMAS HILGENDORF,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

This case involves the use of a quota to make promotions on the basis of race by a municipality. The issue is whether a City can voluntarily use a quota to discriminate on the basis of race with respect to selection of applicants for promotion to the position of sergeant at the City of Flint Police Department. The City prefers to avoid using the term "QUOTA" and instead calls its "QUOTA" an "affirmative action plan" or the "Plan". However, the record below demonstrates that the City rejected the use of traditional affirmative action measures which would have had a less intrusive impact on the rights of non-minorities in favor of a politically popular quick fix quota which trampled on the rights of Plaintiffs because of their race.

This suit was filed in 1990. The Complaint alleges a violation of the Federal Constitution (Fourteenth Amendment) and Federal Statutes (42 U.S.C. Section 1981, 1983). It also alleges a violation of the Michigan Elliott Larsen Civil Rights Act which prohibits discrimination on the basis of race. (MCLA. 37.2102 et. seq.).

The suit was dismissed as a result of a motion for summary judgment filed by the City which contended that the quota was constitutional as a matter of law. The factual predicate for the City's motion was a proposed stipulation of facts submitted to the court by the City's counsel.[1]

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[1]The City filed two separate motions for summary judgment which were addressed by the lower Court. The first motion was filed on October 11, 1991 and raised arguments that (1) Plaintiffs failed to state a claim under 42 U.S.C. Section 1981, (2) that all claims were barred by the statute of limitations, and (3) that Plaintiffs had failed to state a claim under the Michigan Elliott Larsen Civil Rights Act because the Michigan Civil Rights Commission had

[footnote continued]

On January 7, 1993, the lower court found that the quota was constitutional and granted the City of Flint's Motion for Summary Judgment. (Petitioner's Appendix at 39a). In support of this decision, the lower court found that the statistical disparity attested to by the City's expert, coupled with "powerful anecdotal accounts" of continuing discrimination in the police

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approved the quota two years after it was implemented. On July 29, 1992, the District Court issued an Opinion denying the Motion to Dismiss the Federal claims, but granting dismissal of the Elliott Larsen Civil Rights Act claim because the quota had been approved by the Michigan Department of Civil Rights, albeit two years after it was implemented. (Petitioner's Appendix (hereafter App.) at 58a).

The second motion for summary judgment filed by the City raised the issue of the constitutionality of the quota. Prior to filing this motion, the Court held a status conference for the purpose of laying out procedure as to how this issue would be addressed. At the status conference, the parties agreed that the Human Relations Commission hearings held by the City of Flint and the report by the Human Relations Commission would form a common factual basis upon which the parties would rely to determine if the quota was constitutional. In addition, the City was directed by the Court to attempt to secure a stipulation of facts from not only these Plaintiffs but also from another set of Plaintiffs who were joined in the file for administrative purposes. (The other Plaintiffs had claims adverse to these Plaintiffs in that they desired to have the quota enlarged to include females). (Respondent's Appendix (hereafter "R. App." 2a; Status Conference Order of 10-15-91, paragraph 3, R.83). In lieu of a stipulation, the City specified all the facts it intended to rely on with respect to justifying its quota in a letter to the Court (10-28-91 letter of Nuyen to Court; R. App. at 5a). These facts were used as a basis for the Motion for Summary Judgment. The lower court found that these facts were stipulated facts. *Middleton v. City of Flint,* 810 F. Supp. 874, 879 (E.D. Mich. 1993). On appeal the City argued that the question of whether the quota was constitutional should be decided as a matter of law. While the Plaintiff did argue that there were questions of fact precluding summary disposition, the Plaintiff also argued, in the alternative, based on the facts asserted by the City of Flint, that the Court could find that the quota was unconstitutional as a matter of law. (Plaintiff's Opening Brief at 25).

department, provided a sufficient basis in evidence to support a compelling state interest to adopt the quota. The Court also found that the quota was narrowly tailored. (App. 39a).

On Appeal, the Court of Appeals for the Sixth Circuit reversed the lower court. In its Opinion the Sixth Circuit examined the evidence advanced by the City and concluded that the record did "not provide a strong basis in evidence that the Flint Plan served a compelling state interest" and the quota was not narrowly tailored to achieve the claimed interest. (App. 38a). Therefore, the Court reversed the District Court's grant of summary judgment and held that "the Flint Plan 1:1 quota for promotion was unconstitutional". (App. 38a). The City has petitioned this Court for Certiorari to review the opinion of the Sixth Circuit. This Petition should not be granted for the following reasons.

STATEMENT OF FACTS

Absent the use of a racial quota, the selection process for the position of sergeant at the City of Flint Police Department is a neutral multi-step process. Under that process, a notice of vacancy is posted, police officers employed by the city are permitted to apply, a written exam is administered and the results of the written exam for each applicant are calculated. The applicant's written score is combined with the applicant's seniority to create an eligibility list. A minimum score of 70 percent is required to be eligible for promotion and applicants are ranked on the eligibility list based on written scores and seniority. (Seniority points do not accrue beyond 5 years seniority).

The quota used in this case alters that process by using race as a criterion by imposing a one for one promotional

quota which requires the City to alternatively promote a minority applicant over a Caucasian applicant even if the Caucasian ranks higher on the eligibility list.

The quota is claimed to have been adopted in response to hearings held by the City of Flint's Human Relations Commission ("HRC") in 1984. The HRC completed a report which concluded that the quota was necessary based on its findings that there had been prior judicial determinations of discrimination in promotion to the position of sergeant at the police department, findings of general societal discrimination, testimonial pronouncements of discrimination, and certain statistics said to establish discrimination in promotion to the position of sergeant. (App. 94a).

The HRC finding was actually opposite of a finding of the United States District Court for the Eastern District of Michigan in the decision of *Alfaro v. Suber* in 1977. (App. 206a-207a). In *Alfaro,* the Court found that there was insufficient evidence to establish discrimination against African American applicants for the position of sergeant to warrant any relief claimed by the litigants in that case. *Alfaro v. Suber* (App. at 206a-207a).

Not only did the *Alfaro* decision find no basis for ordering any equitable relief with respect to quotas for promotion to the position of sergeant, it also found that because there was a general improvement in minority representation at the entry level police officer position within three and one half years preceding the decision (1973-1977) that the imposition of a quota for hiring at the entry level was also unnecessary. (App. 5a).[2]

[2]The HRC also cited the decision of *Holliman v. Price* as authority for the proposition that a quota was warranted. However, as noted by the Sixth Circuit, the Court in *Holliman* expressly stated that it would "decline at that time to order any particular quota in the hiring of blacks vis-a-vis whites or other non-black minorities". (App. at 3a).

An absence of past discrimination is documented in the record. Testimony by the Chief of Police Miles White was to the effect that he had been in the police department since 1964 and had never observed any intentional discrimination up to the time the quota was implemented. (R. 113, Deposition excerpt at p. 17, R. App. at 14a). The personnel director, Thomas Bugbee, who was employed at the City of Flint between 1968 and 1988 also categorically denied any practices by the personnel department to intentionally discriminate against black applicants in promotion. (R. 113, Bugbee deposition at pp. 10-15, R. App. at 17a-20a).

The HRC findings with respect to prior discrimination were questionable at best. Those findings were either based on testimony from persons tied to a mayoral administration predisposed to implement a quota or from a procedure allowing people to come in off the street and attest to their experience without being subjected to any procedure which would assure the veracity of their testimony. (App. 94a-95a).

The record in this matter establishes that the quota in 1984 was the product of racial politics that had its seeds in the election of the City's first elected African-American Mayor, James J. Sharp. At his deposition, Mayor Sharp confirmed that he ran on a platform advocating quotas to promote affirmative action in City employment. (R. 113; Sharp Deposition at 11; R. App. at 26a).[3]

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[3] An unsuccessful Plaintiff in *Alfaro*, Richard Dicks, was appointed by Sharp as Deputy Administrator for Public Safety. (R. 113; Sharp Deposition at 14, R. App. at 29a). The Chief of Police and the Personnel Director both testified that before the hearings were held by the HRC to determine whether affirmative action in the form of a quota was necessary that Sharp was advo-

[footnote continued]

The HRC also made findings that a quota was necessary based upon general observations of societal discrimination. (App. 98a). The HRC ignored the City of Flint's personnel director's knowledge that less restrictive remedies than quotas were available in the form of validated test procedures known as assessment center techniques. (R. 113, Bugbee at 20-22, R. App. at 21a-23a).

The HRC also relied upon a statistical analysis prepared by Dr. Marc Bendick. This statistician based his study on a comparison of the general labor pool to the percentage of minority sergeants in the Department. In 1992 Bendick created a more refined labor pool. The actual labor pool used by the city to draw applicants for the position of sergeant is the pool of existing Flint police officers. The Plaintiff's Statistician did an analysis of the disparity between the actual labor pool and the percentage of sergeants and concluded that when the real labor pool was compared with the percentage of sergeants that no disparity existed beyond 1986. (App. 225a).

Although the Michigan Department of Civil Rights did approve the quota at the request of the City, it was done years after the quota was implemented. (R. 85, admission by City; R. App. at 29a).

The Sixth Circuit found in an opinion below that the HRC report and statistical evidence advanced by the City was insufficient to demonstrate a compelling state interest supporting the quota. The Court also found that there was insufficient evidence to establish that the quota was narrowly tailored. The City argues that this Court should grant Certiorari to review these issues. It is the

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cating the implementation of the quota. (R. 113; Bugbee deposition at 25 and White deposition at 9; R. App. at 13a-14a, 23a, 24a). Clearly the record established that Sharp intended to implement a quota and that the "hearings" by the HRC were simply a vehicle for justifying what was already intended to be implemented.

Plaintiff's position that Certiorari is not properly granted for the reasons that follow.

ARGUMENT

I.

THE SIXTH CIRCUIT USED THE CORRECT LEVEL OF SCRUTINY WHEN STRIKING DOWN THE QUOTA.

According to the City, the Sixth Circuit ignored this Court's precedents and employed a level of scrutiny it refers to as "fatal in fact"[4] which no quota could withstand. The City claims that the Sixth Circuit made three departures from this Court's precedents.

The first departure claimed by the City is an alleged ruling by the Sixth Circuit that the evidence justifying a quota must show that there continues to be a nearly complete exclusion of minorities. The City has come up with this interpretation of the opinion below based on the Appellate Court's discussion of *United States v. Paradise,* 480 U.S. 149, 107 S.Ct. 1053, 94 L.Ed.2d 203 (1987). In *Paradise,* this Court upheld a 1:1 quota but only after the proof established a history of egregious discrimination. The City argues that the Sixth Circuit misconstrued the decision in *Paradise* to require evidence of "nearly complete exclusion of minorities" in order to justify a quota. This is simply not true.

In the lower Court, the City had relied heavily on *Paradise* as authority to justify its use of the 1:1 quota. The District Court accepted the City's argument and relied on *Paradise* to uphold the quota. *Middleton v. City of Flint, supra,* 810 F. Supp. 881-883.

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[4]The term fatal in fact is a catch phrase the City took from *Adarand Constructors, Inc. v. Pena, supra.* However, the scrutiny used by the Sixth Circuit was taken from *The City of Richmond v. J.A. Croson Co.,* 488 U.S. 469 (1989).

On appeal, the Plaintiffs pointed out that *Paradise* was a case with facts which were substantially different from the case at hand. Unlike the City of Flint situation, the factual predicate in *Paradise* for establishing a strong basis in evidence that discrimination occurred was the long-standing intentional discrimination by the employer. *Paradise* was the only Supreme Court decision where a quota close to the magnitude used by the City of Flint in this case was upheld. However, in *Paradise* the quota was actually less restrictive because it was only approved for a limited duration. Plaintiffs argued that the factual dissimilarities between the history giving rise to the need for a quota in *Paradise* and the history in the City of Flint made *Paradise* inapplicable. The Sixth Circuit agreed. (App. 14a-16a).

The second departure from precedent asserted by the City is its claim that the Sixth Circuit incorrectly concluded that because the decisions in *Holliman* and *Alfaro* did not order one for one quotas such a plan could not be justified as a necessary remedy in 1984 as a matter of law. The City then argues that the Sixth Circuit's observation that the Court did not order a quota was tantamount to the Sixth Circuit refusing to follow U.S. Supreme Court decisions "holding that a judicial finding of discrimination is not a necessary pre-requisite to the adoption of a quota" (City's Brief at 9). Once again, the City's argument is based on misstated facts. Nowhere in its decision does the Sixth Circuit hold that a prior judicial determination of past discrimination is necessary to establish a compelling State interest for the implementation of a quota. What the Court of Appeals did was observe that, even when the disparity was more substantial than disparities that existed when the City voluntarily imposed a quota, the Courts found that a drastic remedy in the form of a quota was not necessary:

> **"As the record before us makes clear, the federal courts have been invited by litigants for more than twenty years to order hiring and promotion quotas in the Flint police department quota, and the courts have refused to do so.** Those courts were presented with the pre-1973 history, just as the HRC was during its public hearings. Similarly, those courts were offered statistical analysis. They found that discrimination existed before 1973, but they also found that the police department was taking steps to rectify past wrongs. **Since the time of *Holliman* and *Alfaro*, minority representation on the police force continued to increase, in some measure because of the litigation that brought the police department's practices under the watchful eyes of the courts. Minority promotions to sergeant increased at an even sharper pace, again in an atmosphere marked by the awareness that the courts were watching, but without the imposition of quotas by the court. Notwithstanding their findings of past discrimination in the years before 1973, those pre-*Croson* courts consistently found a quota on hiring or promotion to be an unnecessarily drastic remedy, in light of the circumstances before them."** (emphasis added) (App. 19a).

The third alleged departure asserted by the City is based on its claim that the Sixth Circuit held that the impact of a promotional remedy on non minorities is "severe as a matter of law" (City's Brief at 9-10). Once again the City misconstrues the Court of Appeals holding. The Court did not hold that a promotional remedy is so severe so as to require finding it to be unconstitutional as a matter of law in every case. Rather, the court held where undisputed facts, such as those here, establish the denial of a significant promotional opportunity for a substantial period of time then it will find such a quota has a significant adverse impact on the rights of third parties

so as to violate the requirement that the remedy be narrowly tailored. (App. 38a).

Given the above, this court should not find that the Court of Appeals departed from this Court's standards for strict scrutiny.

II.
THE SIXTH CIRCUIT DID NOT IMPROPERLY SHIFT THE BURDEN OF PROOF TO THE CITY.

In Argument II of its Petition, the City claims that the Court of Appeals erred in shifting to the City a "heavy burden of proving the plan was constitutional". According to the City, once it is shown that it is using a racial preference it need only articulate some legitimate basis for its racial quota and the burden of proof and persuasion will remain with the Plaintiff to demonstrate no compelling interest exists to use a racial quota. (City's Brief at 11-13). The City's position on this issue is erroneous for two reasons.

The first reason is that the City incorrectly states that the Sixth Circuit used the improper burden of proof when scrutinizing the quota. Recently, this court reiterated the proposition that governmental racial classifications are subject to the strictest scrutiny. *Adarand Constructors Inc., v. Pena,* 515 U.S. ___ , 115 S.Ct. 2097, 132 L.Ed.2d 158, 179-180 (1995), held that "**any person of whatever race, has the right to demand that any governmental agency justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny**". (emphasis added). Accordingly, the Court of Appeals recognized that the governmental actor here must justify its racial classification (App. 18a).

The second reason the City's argument is incorrect is that the City's suggested analysis is the analysis used in

Title VII litigation, not Fourteenth Amendment litigation. See *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). While some Fourteenth Amendment cases have suggested that the Plaintiff retains the burden of persuasion when challenging a suspect classification, none of these cases has ever held that the burden on the part of the government is simply to "articulate" a compelling state interest. This Court has never held that the level of scrutiny required to justify a governmental classification based on race should be reduced to the minimal scrutiny used in Title VII litigation.

Assuming for the sake of argument that the Plaintiffs have the burden of persuasion in this matter, relaxing the government's burden in justifying the use of a racial classification to the degree that the City suggests would defeat the very purpose of strict scrutiny review. In *Johnson v. Mortham,* 915 F. Supp. 1574 (N.D. Fla. 1996), the court found that the Plaintiff retained the burden of persuasion on all issues. It also found that such a burden did not require the Plaintiff to prove a negative or even produce any witnesses or evidence in opposition to the justification asserted by the government for the racial classification. Rather, the Court noted that in order to meet its burden of persuasion the Plaintiff need only persuade the court with an "argument" that the government has not produced sufficient evidence demonstrating a compelling governmental interest. *Johnson v. Mortham, supra,* 915 F. Supp. at 1580.

In the case at hand, the parties had stipulated to a procedure whereby the City would advance all the facts it believed justified the quota in order to establish a compelling state interest. This procedure was memorialized in a Pre-trial Order. (R. 83 Status Conference Order of 10/15/91, paragraph 3; R. App. at 2a). In addition, the

Plaintiffs produced evidence and raised arguments to overcome the justification advanced by the City in favor of the racial quota. Under the circumstances, the Court of Appeals was correctly persuaded by the Plaintiffs that the City had not made a sufficient showing to satisfy strict scrutiny review.[5]

III.
THE SIXTH CIRCUIT PROPERLY FOUND THAT THE CITY'S STATISTICAL EVIDENCE WAS NOT ADEQUATE TO DEMONSTRATE A COMPELLING STATE INTEREST.

The Court of Appeals found the City's statistical analysis did not demonstrate a compelling state interest justifying the racial quota because the statistics were "misleading and conclusory". (App. 25a-26a). The City

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[5] The City has cited to the cases of *Stuart v. Roache*, 951 F.2d 446 (1st Cir. 1991), *cert. den.*, 504 U.S. 913 (1992); *Concrete Works of Colorado v. City of and County of Denver*, 36 F.3d 1513 (10th Cir. 1994), *cert. den.*, 115 S.Ct. 1315 (1995) for the proposition that the lower court in this case applied an improper burden of proof. (See City's Brief at 12, fn. 10). Both of these cases are distinguishable. *Stuart* involved a consent decree, not a voluntarily implemented quota. Moreover, in *Stuart* there was a long standing history of past proven discrimination through litigation in the federal courts. In *Stuart*, it was not just statistics that the Court found to provide a strong basis in evidence for remedial relief but also the past history of discrimination, unfair examinations and no evidence rebutting the evidence submitted. See *Stuart, supra*, at 452-453. The *Concrete Works* decision is also substantially different than the case at hand. There the Court considered a challenge to a set aside program implemented by the City through an ordinance. The Court found that the burden of production was on the City to demonstrate a strong basis in evidence for the implementation of this race conscious Ordinance. The Court noted that *Croson* provides that the strong basis in evidence will be evaluated on a case by case basis. While the Court did find that a burden of persuasion remained with the Plaintiff, the Court in this case found that the Plaintiff met its burden of persuasion under the procedure agreed to.

argues the Court of Appeals erred. Each argument is addressed below.

A. The City Has Misstated The Court of Appeal's Holding.

When addressing the statistical issues in this case, the court of appeals noted that the issue of which labor pool population sample was appropriate was the subject of debate between the parties. In its opinion, the appellate court noted that in "actual practice" there is only one population group that is eligible for promotion to the rank of Flint police Sergeant. That relevant statistical pool is the population of previously hired Flint police officers." *Middleton,* App. 25a. However, the court expressly stated that due to the "incomplete and misleading nature" of the statistical analysis advanced by the city, that it was not necessary to decide which population sample was appropriate:

> **"Because we hold that Dr. Bendick's statistical labor-force analysis was incomplete and therefore irrelevant to the question before the district court, we need not decide at this time whether the district court erred by choosing to use the city's general labor force as its relevant population sample, rather than limiting its analysis, as plaintiffs urge, to the population of already-hired Flint police officers, of whom Blacks comprised 17.3% in 1984."** (emphasis added). (App. 23a, footnote 8).

Incredibly, in an effort to mislead this Court into thinking the court of appeals failed to follow *Paradise,* the city took the court's observation about the actual hiring practice being from the pool of existing police officers and claimed the court specifically held that this labor pool was the appropriate pool to use for a statistical analysis.

(City's brief at 13). Therefore, this argument by the City should be rejected.

The City also incorrectly argues that *Paradise* sets forth an ironclad rule that requires an analysis incorporating the alleged effect of discrimination at the entry level as influencing discrimination at the promotional level. (City's Brief at 14). *Paradise* did not set down an ironclad rule to determine what a qualified labor pool is. Rather, *Paradise* found the statistical analysis in that particular case coupled with evidence documenting 37 years of egregious intentional discrimination was sufficient to justify a quota for a limited duration. The appropriate labor pool used in a statistical analysis will necessarily vary on a case by case basis. As noted in *Croson,* the relevant inquiry is whether the labor pool reflects the qualified pool of applicants. In this case the undisputed facts were that applicants were not hired from the outside labor force. (R. App. at 15a, Miles White Deposition p. 27). Also, here the federal courts had previously examined the city's entry level hiring practices years before the quota was implemented and found hiring quotas were not necessary due to advances made in minority hiring.[6] Under the circumstances, it was not improper for the court of appeals to reject the analysis used by the cities statistician.

B. The Sixth Circuit Did Not Erroneously Conclude That The City's Statistics Were Based Upon The General Population.

The City claims the Court of Appeals rejected Dr. Bendick's statistics because they were "general labor statistics."

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[6] From 1972-1975, 15 of 29 new police officers hired were minority. Between 1974 and 1975, 56 out of 105 entry level officers hired were minority. (App. 3a).

The Court of Appeals rejected the City's statistics because they were "incomplete, inaccurate, and misleading." (App. 25a-26a). In footnote 8, the court pointed out how the statistics misled the casual observer into believing only two or three minority officers were hired in entry level positions in the 1970s, when, in fact, the City admitted through its own police chief that there were fifteen minorities out of twenty-nine officers hired in 1972 and there were fifty six minorities out of one hundred and five total officers hired in 1974 which constituted 53.5 percent of the police officers hired between 1974 and 1975. This contradicted Bendick's claim that there was a "minority shortfall" in the number of Sergeants because of only a few minority hires in the seventies. This is just one example of why the Court of Appeals concluded the statistics were misleading.

The City also claims the Court of Appeals improperly referred to Bendick's statistics as "general labor statistics". The cause for the City's concern over the use of this nomenclature stems from the language in the decision of *The City of Richmond v. J.A. Croson Company,* 488 U.S. 469 (1989). *Croson* holds that, where a job has special qualifications, statistics showing a disparity between the racial composition of the employer's work force and the racial composition in the general population will not support a compelling state interest justifying the use of any affirmative remedies based on race let alone a quota. *City of Richmond v. J.A. Croson Company, supra,* 488 U.S. at 501-502.

The *Croson* decision was handed down *after* the first report prepared by Bendick, and *after* the City published its HRC findings which contained statistics which the City claims supported the use of the quota. The record demonstrates that the City's HRC specifically stated it relied on general population statistics when it recom-

mended a quota with an end goal of securing forty five percent minority sargeants. (App. 99a, paragraph 20-21). Indeed, in other litigation involving this same quota before *Croson,* the City specifically represented to the federal courts that the HRC found general population statistics were the appropriate basis for its target of hiring forty five percent minority sargeants. See *Barcume v. City of Flint,* 41 F.E.P. Cases 783, 785 (E.D. Mich. 1986), which involved the same quota where the court noted that the HRC was relying on general population statistics. It was only after the decision in *Croson* and the instant litigation was initiated that the City changed the nomenclature and claimed that it was using specialized labor force statistics.[7] Given this background, even if the Court of Appeals had found the City of Flint used general population statistics as opposed to labor market statistics it would not have constituted error since such a finding is supported by the record. Moreover, even if such a finding is erroneous, it is harmless here because the misleading and conclusory nature of the statistics used by the City provides an independent ground to affirm and precludes a finding that the substantial rights of the City are adversely affected. 28 U.S.C. Section 2111.

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[7] In a new statistical analysis created by *Bendick* for this litigation in 1992, *Bendick* claimed that he used specialized labor force statistics all along. Since the change in nomenclature coincided with *Croson's* disapproval of the previously referred to statistics, Plaintiff raised this issue in the Court below. However, the district court sided with the City finding as a matter of law that labor market statistics were used. *Middleton v. The City of Flint, supra,* at footnote nine. Plaintiff raised this issue on appeal. The City argued on appeal that the lower court could properly find the labor market statistics were used as a matter of law. (City's brief on appeal to the Sixth Circuit at 17-18, footnote 14).

C. The Sixth Circuit Properly Found That The Statistical Disparity Established By The City Of Flint Did Not Justify The Use Of A Racial Quota Of The Magnitude Used By The City Of Flint.

The City asserts that the Sixth Circuit held "that a gross statistical disparity can never sustain an affirmative action plan". This is not at all what the Court held. Rather the court held as follows:

> ". . . we hold that a disparity between the percentage of a protected class employed in a particular work force or occupation and the raw percentage of class members in a regional pool, standing alone, cannot be "a strong basis in evidence" sufficient to justify hiring or promotion quotas. That is, it is permissible to remedy discrimination. It is not permissible to remedy disparity without more". *Middleton v. City of Flint, supra,* App. at 22a-23a.

This language is consistent with recent decisions by this court. In *Adarand Constructors, Inc. v. Pena, supra,* this court readopted the standards found in *Paradise* which held that evidence of "pervasive, systematic and obstinate conduct" was needed to justify a very "narrowly tailored race-based remedy". *Adarand Constructors, Inc. v. Pena, supra,* 515 U.S. ___ , 32 L.Ed.2d 158, 199, 115 S.Ct. 2097 (1995). Moreover, while this court observed in *Croson* that "where gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern of discrimination under Title VII" this court did not hold that such a disparity would necessarily provide a sufficient basis to justify the use of a 1:1 *racial quota* under the Fourteenth Amendment. In *Washington v. Davis,* 426 U.S. 229, 42 L.Ed.2d 597, 96 S.Ct. 2040 (1976), the Court held that showing disparity alone was not enough to

establish a prima facie violation of the Fourteenth Amendment. *"Our cases have not embraced the proposition that a law or other official act without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact". Washington v. Davis, supra,* 426 U.S. at 238. The *Davis* court held that while evidence of disparity is probative, showing disparity alone is not enough to show a finding of unconstitutional racial discrimination which would warrant remedial relief under the Fourteenth Amendment to undue such racial discrimination. The same consideration should apply to an analysis in this case. For the government to establish that the constitution requires the drastic remedy of a one for one racial quota it should be required to establish that the evidence warrants the constitutional remedy. Since a showing of disparity without more is not enough then the City's statistics are inadequate.

A gross statistical disparity alone may never justify a quota under the rationale of *Croson* not simply because it fails to provide a strong basis in evidence for any kind of remedy but because it fails to provide a strong basis in evidence to justify a *burdensome racial quota.* Under *Croson,* one reason for requiring findings of the City's basis in evidence for taking action based on race is "to define both the scope of the injury and the extent of the remedy necessary to cure its effects". *Croson, supra* 488 U.S. at 510. A finding of disparity alone may only justify the use of a remedy with a less restrictive impact on third parties like test validation, removal of unrelated degree requirements or the intensification of minority recruitment. See *Hazlewood School District v. United States,* 433 U.S. 299 (1977). However, a gross disparity coupled with evidence of pervasive, long standing intentional discrimination may justify remedies with

more burdensome impacts such as quotas. See for example *United States v. Paradise, supra.* Given the circumstances in this case establishing the absence of intentional discrimination, the findings of lower Federal Courts that quotas were unnecessary just a few years prior to the implementation of the quota in issue, and the misleading and incomplete nature of the City statistics, the Court of Appeals did not err in finding the disparity relied on by the City did not justify the use of the racial quota.

IV.

THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE QUOTA WAS UNCONSTITUTIONAL WITHOUT PLAINTIFF FILING A CROSS MOTION FOR SUMMARY JUDGMENT.

The City states that a question presented on this appeal is whether the Court of Appeals could enter a Judgment finding the quota unconstitutional without the Plaintiff having filed a cross motion. In the body of its brief, the City contends that the Court of Appeals improperly abandoned its inquiry as to whether there was a genuine issue of material fact for trial and instead resolved factual issues as a matter of law (City's Brief at 18-22). The City goes on to argue that the Court of Appeals improperly addressed issues that were not raised by Plaintiff. The City's argument on this issue is an attempt to abandon the agreements and concessions on procedure that it made below.

A. The Court Of Appeals Properly Found The Quota Was Unconstitutional Without The Necessity Of A Cross Motion.

At a status conference below, the parties agreed that the HRC hearings and report would form a common factual basis upon which the parties would rely to determine if the quota was constitutional. The City was directed to

try to secure a stipulation on this point. (Status conference order of 10-15-91, paragraph 3, R. 83, R. App. at 2a). In lieu of a stipulation, the City specified all of the facts it intended to rely on with respect to justifying its quota in a letter to the court. (R. App. at 5a, 10-28-91 letter of Nuyan to court). These facts were used as a basis for the Motion for Summary Judgment. On appeal, the City argued the question of whether the quota was constitutional should be decided as a matter of law.

One reason it was not error to hold the quota unconstitutional as a matter of law is that the City agreed that the HRC report would form a common factual ground on which to judge the constitutionality of the quota.[8] Therefore, there was no reason to file a cross motion since the procedure to determine the issue of the constitutionality of the quota from the perspective of either party was agreed to. The City is estopped from arguing in favor of using a different procedure at this late date. *Ferguson v. Neighborhood Housing Services of Cleveland, Inc.*, 780 F.2d 549 (6th Cir., 1986).

Under the Federal Rules of Civil Procedure a cross motion for Summary Judgment is not necessary for a Court to enter summary judgment in favor of the party opposing summary judgment. It has long been recognized that "the grant of summary judgment to a nonmoving party is a relatively frequent occurrence in the Federal Courts" because such relief is in keeping with the objective of Rule 56 to expedite the disposition of cases and Rule 54 to grant relief even if relief is not demanded.

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[8] In accordance with the status conference order the City represented to the Court that all events and documents it submitted in support of the quota were "the events upon which the . . . City of Flint will rely to establish the constitutionality of the AAP as originally constituted in 1984" and "the documents upon which the City would rely to establish the constitutionality of the plan". (R. App. at 5a Nuyan letter of 10-28-91).

Kellner v. Aetna Casualty and Surety Company, 605 F. Supp. 331 (M.D. Pa. 1984). This principle extends to judgments on appeal. *Bosarge v. Department of Education*, 5 F.3d 1414, 1416 fn. 4, (11th Cir. 1993); *cert. den.*, 114 S.Ct. 2720; 129 L.Ed.2d 845 (U.S. 1994); *International Longshoremans Association AFL-CIO v. Seatrain Lines, Inc.*, 326 F.2d 916, 921, fn. 2 (2nd Cir. 1964). Thus, a cross motion was unnecessary.

B. The Court Of Appeals Did Not Improperly Address Issues Raised On Its Own.

The City claims that the Sixth Circuit improperly extrapolated from Plaintiffs testimony on the record that ten points had been added to all the scores of the 1987 exams. However, this fact was established by the City's own admissions. When examining the issue relating to the quota's flexibility and duration to determine if the plan was narrowly tailored, the appellate court focused on documents which established that a minimum score of 70% was necessary to be qualified as sergeant, and when no minority candidate achieved the minimum passing score of 70% in 1987, that ten points were added "to all test takers thereby altering otherwise failing grades as low as 60% into qualifying scores". (App. 3a). Moreover, counsel confirmed this was the practice at oral argument. (App. 3a). Given the City's admission on this issue the court properly concluded that the alterations of grading destroyed the City's claim that the quota did not result in unqualified persons being promoted. (App. 3a). The City is bound by the documents that it creates as well as the admissions of counsel. Admissions and pleadings are binding on the parties and they support Summary Judgment against the party making such admissions. *Missouri Housing Development Commission v. Brice*, 919 F.2d 1306, 1315 (8th Cir. 1990). Statements made by counsel in the course of litigation bind a party on Summary Judg-

ment for purposes of both the lower court and appellate court proceedings. *Ferguson v. Neighborhood Housing Services of Cleveland Incorporated,* 780 F.2d 549 (6th Cir. 1986); *Curb v. MCA Records,* 989 F. Supp. 586, 590 (M.D. Tenn., 1995).

The City also complains about the Sixth Circuit's observations that the City's statistical analysis was not a reliable indicator of past discrimination. One complaint raised by the City is the court's observation that the statistician assumed that minority men and women as a group are exactly inclined as non-minority men and women as a group neither more so nor less so – to seek employment in the police department, and they are exactly as qualified under nondiscriminatory conditions. (App. 26a). The court found this assumption to be too conclusory and misleading. This was not impermissible issue raising or fact finding by the Court of Appeals. This court made similar observations in *Croson* when it found no basis in evidence from statistics advanced to support a minority set aside program because those statistics rested on "the unsupported assumption that white prime contractors will not hire minority firms". Clearly, it is not improper for an appellate court to disregard "statistics" based on unsupported or conclusory assumptions.[9]

C. The Court Of Appeals Did Not Err In Finding It Was Not Persuaded There Was A Strong Basis In Evidence To Support The Quota.

While the issue of whether there is a strong basis in evidence supporting a quota is a legal question, the City contends that underlying this issue are factual determin-

[9] Similarly, the City's complaint regarding the minority population shift observations by the court is without merit. If such an observation was erroneous it was harmless. Nothing in the Court's opinion holds that this population shift negated the evidentiary value of the City's statistics. (App. 27a, footnote 9).

ations about the accuracy and validity of the municipalities evidentiary support for the quota. According to the City, the court should have remanded the case for trial on the underlying facts. This argument is not correct because the Sixth Circuit accepted the underlying factual support offered by the City to be true and found those facts, even if undisputed, were inadequate to find that there was a strong basis in evidence to support the use of the racial quota. The court did not disagree with the facts, it disagreed with the legal conclusion that the City asked it to draw from these facts.[10]

V.

THE CITY CANNOT NOW CLAIM IT USED A RACIALLY DISCRIMINATORY QUOTA IN GOOD FAITH RELIANCE ON DECISIONS THAT SUCH A QUOTA WOULD NOT BE SCRUTINIZED AS A SUSPECT CLASSIFICATION.

In Argument V of its Brief the City claims for the first time in this litigation that it acted in good faith when adopting the racial quota. The City claims that the law was unclear when it adopted the quota and that it was relying on Sixth Circuit precedent as authority for the proposition that it could utilize a racial quota from 1984 through 1993 without its practices being scrutinized

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[10]The City also suggests that the Sixth Circuit should have remanded this matter just as the Seventh Circuit did in the case of *Billish v. City of Chicago*, 989 F.2d 890 (7th Cir. 1993), *en banc*. However, such action would be inappropriate in this case. In *Billish*, there was a dispute over whether a decision to immediately appoint a black captain rather than wait two months to appoint from a list of candidates derived from a racially neutral test was a necessary decision or a racially motivated decision. See *Billish v. City of Chicago*, *supra*, 989 F.2d at 894. In this case there was no dispute that each decision made for promotion to the position of sergeant was based on racial motivation in the sense that it was based on a racial quota. Therefore, the same rationale for the remand for a factual determination found in *Billish* does not apply in this case.

strictly under the Fourteenth Amendment. (City's Brief at 22-25). According to the City, even under this Court's ruling in *Croson,* its racial quota should not be struck down because the Flint City Council was not controlled by an African-American majority as was the case in *Croson* and therefore the factual predicate for the conclusion of racial politics playing a role in the *Croson* quota was not present in the City of Flint case. (City's Brief at 25). Finally, the City argues that the strict scrutiny standard applicable to racial quotas should not be retroactively applied to protect the constitutional rights of the Plaintiff in this case. Each argument is without merit.

A. When The City Of Flint Utilized The Quota To Deny Plaintiff's Constitutional Rights, The Level Of Scrutiny Under Applicable Law Was Strict Scrutiny.

The City claims that when the plan was put into effect in 1984 that the applicable level of scrutiny was not strict scrutiny, but a "reasonableness" standard as enunciated in *Bratton v. City of Detroit,* 704 F.2d 878, modified at 712 F.2d 222 (6th Cir. 1983, *cert. den.,* 464 U.S. 1040 (1984).[11]

The City cannot seriously claim that it was unaware of the likelihood that the Courts would find that it was violating the fundamental rights of its police officers by using a racial quota in light of the history of litigation pertaining to the City of Flint itself in which the lower

[11] According to the City, this Court did not delineate a clear standard for the level of scrutiny until *Croson* was decided. Because of this, the City reasons that it should not have been held accountable for violating Plaintiff's constitutional rights in promotion from 1984 to 1993 because its decision was based on a reasonableness standard approved in *Bratton* and its quota was reasonable under the *Bratton* test.

federal courts found insufficient evidence of discrimination which would justify the implementation of a quota. *Alfaro,* (App 206a-207a). Moreover, the City's suggestion that precedents from this Court at the time caused it to believe that it could implement a racial quota without facing intense scrutiny suggests that the City was ignoring decisions which made it clear that such classifications would be closely scrutinized. For decades this Court has observed repeatedly that "the highly suspect character of classifications based on race, nationality, or alienage is well established". *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 105 (1973) (Marshall Dissenting; referring to majority precedent for strict scrutiny).

In 1978, this Court stated in *Regents of University of California v. Bakke,* 438 U.S. 265, 289-290, 57 L.Ed.2d 750, 98 S.Ct. 2733 (1978), "the guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection then it is not equal".

In the case at hand the actual promotion denials which violated Plaintiff's constitutional rights occurred between 1987 and 1993. (App. 60a). By 1986, the City knew that this "court has recognized that the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination". *Wygant v. Jackson Board of Education,* 476 U.S. 260, 268, 90 L.Ed.2d 260, 106 S.Ct. 1842 (1986).

The City's reliance on *Bratton* for the proposition that it could ignore this Court's warnings and trample on the rights of non-minority officers just does not wash in this case. *Bratton's* factual predicate contained evidence of systematic intentional discrimination while the City of

Flint's did not. *Bratton's* historical background contained no unchallenged Federal Court ruling finding insufficient evidence of past discrimination which would warrant the use of a quota while the City of Flint's did. However, even without the difference in the facts and the history between the city of Detroit in *Bratton* and the city of Flint here, the City could not rely on the Sixth Circuit precedent in *Bratton* in making its promotions on the basis of race after 1986 because by 1986 the reasonableness standard in *Bratton* had been expressly overruled in *Wygant.* Moreover, by 1987 the next decision addressing the level of scrutiny in the Sixth Circuit specifically overruled the reasonableness test in *Bratton* in favor of strict scrutiny. *Michigan Road Builders, Inc. v. Milliken,* 834 F.2d 583 (6th Cir. 1987), affirmed, 489 U.S. 1061, 103 L.Ed.2d 804, 109 S.Ct. 1333 (1989); *Arrow Office Supply Company v. City of Detroit,* 826 F. Supp. 1072, 1076-1077 (E.D. Mich. 1993).

B. The City Has Waived Any Claim That It Acted In Good Faith At The Time It Formulated The Quota By Failing To Raise That Defense Affirmatively In Its Pleadings.

The City never raised the claim that it was acting in good faith in the pleadings below. It is not found in their Answer, in their Affirmative Defenses, or in their pleadings seeking Summary Judgment. (R. App. at 31a-36a, Affirmative Defenses and Motion). The defenses of good faith and good faith immunity are case determinative legal issues that must be raised before extensive time is invested in the litigation. *Bufford v. Holiday,* 113 F.R.D. 487 (S.D. Miss. 1990). The failure to raise these issues constitutes a waiver of the good faith defense and precludes its consideration on appeal. *In Re Zweiben,* 184 U.S. App. 167, 565 F.2d 742 (D.C. Cir. 1977); *Maul v. Costan,* 928 F.2d 781 (7th Cir. 1991); *National Treasury Employ-*

ees Union v. Internal Revenue Service, 765 F.2d 1174, 1176, footnote 1 (D.C. Cir. 1985); *Renfro v. City of Emporia,* 732 F. Supp. 1116 (D. Kan. 1990).

C. This Court Should Reject The City's Argument That *Croson* Does Not Apply To This Quota.

The City argues *Croson* does not apply. According to the City, the factual predicate is different because in *Croson* the City Council was dominated by African-Americans while the City of Flint Council was not. (City's Brief 25-26). The City reasons that this Court's basis for finding racial politics played a role in *Croson* was the African-American control over the process.

The City's argument ignores the fact that it is undisputed in this case that racial politics played a role in the implementation of the racial quota. In 1977 the lower federal court held in the case of *Afaro v. Suber, supra* that there was insufficient evidence of discrimination with respect to promotion to the position of Sergeant to justify the implementation of a quota or any other kind of affirmative relief. *Afaro v. Suber, supra.* In 1983, the City's first African-American Mayor, James J. Sharp, was elected by running "on a platform that included pledges to implement 'affirmative action plans' that would increase the City's minority hiring and promotion efforts". (App. 5a). Police Chief Miles White admitted in his deposition that before any hearings were held by the HRC he was aware that the Mayor advocated an Affirmative Action Plan. (R. App. at 13a, Deposition of Miles White at 9). The new administration was backed by at least one litigant (Richard Dicks) who was unsuccessful in convincing the federal court to implement a quota in the case of *Afaro v. Suber.* Mayor Sharp named former Plaintiff Richard Dicks Deputy City Administrator of Public Safety after his election. (App. 5a). Personnel

Director Thomas Bugbee was also aware that Sharp was advocating the use of a racial quota even before it had its "fact finding" hearings through the HRC. (Bugbee Deposition at 20-22, R. App. at 21a-23a). Bugbee was also aware of remedies less restrictive than a quota that were available for use as affirmative remedies in the promotional process but he was never called as a witness by the Sharp administration to testify. (Bugbee Deposition *id.*). Clearly, the racial politics at the City of Flint equaled the racial politics in *Croson.*

D. The Court of Appeal's Decision Finding The Racial Quota Unconstitutional Was Properly Held To Apply To The Promotions Denied To The Plaintiff In This Case Between 1987 And The Present Date.

The City claims the decision in this case announces new law which should not be retroactively applied to the City's conduct. They also acknowledge that even when they couch their argument under the terms above that this Court would have to revisit and reverse the decision of *Harper v. Virginia Department of Taxation,* 509 U.S. 86, 125 L.Ed.2d 74, 113 S.Ct. 2510 (1993), to find in favor of the City.

The first reason this argument should be rejected is that the lower Court decision does not announce new law. As noted above, the unconstitutional conduct complained of denied Plaintiff's promotions from 1987 on which was after the Sixth Circuit overruled the lesser scrutiny standard used in *Bratton.* It was also after this Court announced in *Wygant* that racial quotas would be subjected to strict scrutiny. Therefore, there can be no claim of good faith reliance by the City that a less intense review than a strict scrutiny standard applied to the racial quota after 1986. Moreover, the City's claim of good

faith reliance on the right to implement a promotion quota is also suspect because the Federal Court in *Alfaro* found years before the implementation of this quota that a quota was not necessary for remedial action in promotion.

The City's argument should also fail because even if the decision below is new law, the doctrine holding that new law should not be applied retroactively is not applied to deprive a successful litigant of the fruits of the challenge. Thus, even where the Court finds that a change in law should not apply retroactively, that change still applies to the successful parties. *Simpson v. Union Oil Co.*, 396 U.S. 13, 90 S.Ct. 30, 24 L.Ed.2d 13 (1969).[12]

The decision in the instant case does not present an occasion for this Court to revisit *Harper v. Virginia Department of Taxation, supra.* A decision in this case would still be applied retroactively to Plaintiff's promotions even before the ruling in *Harper* was enunciated. *Chevron Oil Company v. Huson,* 404 U.S. 97, 30 L.Ed.2d 296, 92 S.Ct. 349 (1971) when applied to the decision in this case compels retroactive application of the Court's decision to vindicate the promotion denials Plaintiffs have suffered. Therefore, the retroactivity rule found in *Harper* would not be affected by the decision in this case.

Finally, the City's claim that it would be inequitable to hold it accountable for the deliberate and repeated violation of the constitutional rights of the officers under the undisputed facts in this case is so extreme as to be incredible. The fact that the City has the audacity to claim that

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[12]The case of *DPOA v. Young,* 989 F.2d 225 (6th Cir. 1993) did not enunciate a doctrine on retroactivity which changed this principle. On the contrary, the Sixth Circuit found that the decision should be applied and remanded the case to the lower court to determine what relief the officers should receive. *DPOA v. Young, supra,* 989 F.2d at 228.

it is unfair for it to be held accountable for the harm caused by a quota derived from racial politics which has severely impacted on the careers and lives of its police officers even when it was told by lower federal courts that such a quota was not necessary before it was implemented is beyond belief. The City claims that it has not used the quota since 1993. If that is true the statute of limitations has run on any other potential claims and therefore the suggestion by the City of an "enormous potential exposure to class action lawsuits" creating a manifest injustice has no substance.

CONCLUSION

This court should deny the City's Petition for Certiorari, deny the City's request to vacate the decision of the Sixth Circuit, and deny the City's request to remand for a reopening of the record.

Respectfully submitted,

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March 24, 1997

APPENDIX A

[Filed OCT 29, 1991]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION – FLINT

CIVIL ACTION NO: 90-CV-40148-FL

CHARLES MIDDLETON, W. OSMUND KELLY, III, BRIAN SEPANAK, BRUCE SEPANAK, STEPHEN HILL, GREGORY DOERR, BARRY SAUNDERS, ROBERT LOREY, MAYNARD NEWMAN, JAMES McCLELLAN, MARK CAMPBELL, and THOMAS HILGENDORF,

Plaintiff,

v.

THE CITY OF FLINT, a municipal corporation,

Defendant.

CIVIL ACTION NO: 84-CV-8066-FL

MARADEAN BARCUME, CHARI BORTNER, BARBARA BURNETT, ANN DRENNAN, LEE ANN GASPER, CONNIE MARTIN, MAUREEN McINTYRE, DAWN SKIDMORE, JACQUELINE SOVA, KRISTINE SURDU, ANN TALT-HARRIS, DEBRA WILLIAMS and MICHELLE MARSHKE,

Plaintiffs,

v.

THE CITY OF FLINT, a municipal corporation, and the FLINT POLICE OFFIERS ASSOCIATION, a labor union,

Defendants.

STATUS CONFERENCE ORDER

In *Middleton v. City of Flint*, a Status Conference was held on October 15, 1991. At that conference the following matters were discussed and decided:

1. Defendants will be allowed to complete their deposition of Dr. Frank, and may depose the *Middleton* plaintiffs' economic expert.
2. For administrative purposes only, this case will be consolidated with *Barcume v. City of Flint*, no. 84-8066. At the Final Pre-Trial Conference the Court will determine whether the case should be consolidated regarding the substantive issue of the constitutionality of the Affirmative Action Plan.
3. Defendants will propose to the plaintiffs in both *Middleton* and in *Barcume* a common factual basis upon which the constitutional issue will be determined. By October 22, 1991, defendants will notify the Court whether a stipulation on this matter can be achieved, and if so what that stipulation entails. (At the conference, the parties present agreed that the Human Relation Commission Hearings and resulting report probably form a common factual background upon which all parties will rely to make their respective arguments.)
4. The parties, in *Middleton* and in *Barcume*, must also jointly determine the questions that will be asked of each party's expert. The parties will notify the Court in writing of the questions to be asked by November 6, 1991.

5. The defendants have filed a Motion for Summary Judgment in both *Middleton* and *Barcume*. The plaintiffs in both cases will respond to defendants' Motions for Summary Judgment by November 4, 1991.

6. A hearing on defendants' Motions for Summary Judgment in both cases will be held on November 18, 1991 at 1:30 p.m. This hearing is scheduled for the entire afternoon.

7. The Court will decide all other pending motions (except the Motion for Consolidation) in *Barcume* and *Middleton* by November 18, 1991.

8. Following the November 18th hearing, for both *Middleton* and *Barcume*, a joint Status Conference will be held on the record.

SO ORDERED.

Date: 10/28/91

/s/ Stewart A. Newblatt 10/28/91
STEWART A. NEWBLATT
United States District Judge

[Filed OCT 29 1991]

CERTIFICATION OF SERVICE

CASE NO: 90-40148
84-8066

UNITED STATES OF AMERICA)
) SS
EASTERN DISTRICT OF MICHIGAN)

I, the undersigned, hereby certify that I have on the 29th day of October, 1991, mailed a copy of the Status Conference Order in the foregoing cause, pursuant to Rule 77(d), Fed.R.Civ.P., to the following persons at the addresses given:

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/s/ Colette J. Lehoux,
Secretary to Stewart A. Newblatt
United States District Judge

APPENDIX B

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FAX (313) 647-3642

October 28, 1991

The Honorable Stewart Newblatt
140 Federal Building
600 Church St.
Flint, Michigan 48502-1279

Re: *Middleton, et al. v. City of Flint, et al.*
Case No.: 90-CV40148FL

Dear Judge Newblatt:

In accordance with your direction at the October 15, 1991, status conference in the case of *Middleton, et al. v. City of Flint, et al.*, I contacted Ms. Winshall, attorney for the Plaintiffs in *Barcume v. City of Flint* to prepare a Stipulation of the proofs the parties would present in *Barcume* on the issue of the constitutionality of the affirmative action plan. I spoke with Ms. Winshall on October 21, 1991. As I understood her position, she believes that the facts and documents to support her clients' position on the constitutional issues are set forth in the Motion for Summary Judgment which she filed in December, 1985 and her response to Defendant City of Flint's Motion for Summary Judgment also filed in December, 1985. Ms. Winshall did not believe that preparing a written Stipulation of Facts would result in a document radically different from the cross Motions for Summary Judgment. Accordingly, she refused to enter into a Stipulation.

The purpose of this letter therefore, is to apprise you of the events upon which Defendant, City of Flint, will rely to establish the constitutionality of the affirmative action plan as originally constituted in 1984, and to list the documents upon which the City of Flint would rely to establish the constitutionality. Thus, while I do not have a Stipulation between Ms. Winshall and myself, I have enclosed lists of the events and documents which the City believes are pertinent to the constitutional issue. If you have any questions regarding these lists, please do not hesitate to contact me.

Very truly yours,

KELLER, THOMA, SCHWARZE,
SCHWARZE, DuBAY & KATZ, P.C.

/s/ Donna R. Nuyen
Donna R. Nuyen

DRN/dgp: 503
Encl.
cc: Michael Kelly
Gregory Gibbs
Susan Winshall

DEFENDANT CITY OF FLINT'S LIST OF EVENTS RELATIVE TO THE CONSTITUTIONALITY OF THE POLICE DEPARTMENT'S AFFIRMATIVE ACTION PLAN ADOPTED IN 1984

1. Council's Special Legislative Committee meeting of August 26, 1981.
2. Special Flint City Council meeting of April 4, 1983.
3. Special Flint City Council Meeting of April 7, 1983.
4. Special Flint City Council Meeting of April 8, 1983.
5. Special Flint City Council Meeting of April 18, 1983.
6. Special Flint City Council Meeting of January 30, 1984.
7. Special Flint City Council Meeting of February 1, 1984.
8. Negotiations between the City of Flint and the Flint Police Officers Association for the July 1, 1983 – June 30, 1984 collective bargaining agreement.
9. Negotiations between the City of Flint and the FPOA for the 1984 Addendum to the collective bargaining agreement.
10. Affirmative action committee meetings in 1983.
11. POAM ratification vote in January, 1984.
12. Human Relations Committee hearing on April 4, April 10, and April 11, 1984.
13. Negotiations between the City of Flint and the FPOA for the July 1, 1985 – June 30, 1988 collective bargaining agreement.

14. Negotiations between the City of Flint and the FPOA for the July 1, 1988 – June 30, 1989 collective bargaining agreement.
15. Negotiations between the City of Flint and the FPOA for the July 1, 1989 – June 30, 1992 collective bargaining agreement.
16. Sergeants promotional exam in 1983.
17. Sergeants promotional exam in 1985.
18. Sergeants promotional exam in 1987.
19. Sergeants promotional exam in 1989.
20. 1980 Census.
21. 1990 Census (when available).

DOCUMENTS UPON WHICH THE CITY OF FLINT MAY RELY

1. 1971 City Affirmative Action Plan.
2. 1985 City Affirmative Action Plan.
3. 1975 SAAP Affirmative Action Agreement for promotions to sargeant.
4. 1972 collective bargaining agreement between the City of Flint and the FPPA.
5. 1975 Agreement between Flint and Teamsters Local 214.
6. 1977 Agreement between Flint and Teamsters Local 214.
7. 1980 Agreement between Flint and Teamsters Local 129.
8. 1983-1984 collective bargaining agreement between Flint and the FPOA.

9. 1984 Addendum to collective bargaining agreement, July 1, 1983 to June 30, 1985.
10. 1985-1988 collective bargaining agreement between the City of Flint and the FPOA.
11. 1988-1989 collective bargaining agreement between the City of Flint and the FPOA.
12. 1989-1992 collective bargaining agreement between the City of Flint and the FPOA.
13. Posting, 1983 sergeant's promotional exam.
14. Eligibility list, 1983 sergeant's promotional exam.
15. Posting, 1985 sergeant's promotional exam.
16. Eligibility list, 1985 sergeant's promotional exam.
17. Posting, 1987 sergeant's promotional exam.
18. Eligibility list, 1987 sergeant's promotional exam.
19. Posting, 1989 sergeant's promotional examination.
20. Eligibility list, 1989 sergeant's promotional exam.
21. Flint City Council Meeting Minutes, August 26, 1981.
22. Flint City Council Meeting Minutes, July 19, 1983.
23. Flint City Council Meeting Minutes, April 8, 1983.
24. Flint City Council Meeting Minutes, April 18, 1983.
25. Flint City Council Meeting Minutes, January 30, 1984.
26. Flint City Council Meeting Minutes, February 1, 1984.
27. Correspondence to union members, January 20, 1984.
28. HRC hearing transcript, August 4, 1984.

29. HRC hearing transcript, April 10, 1984.
30. HRC hearing transcript, April 11, 1984.
31. Need For Affirmative Action In The City of Flint's Police and Fire Department: A Report of Public Hearings.
32. Minority hiring and promotion in the Flint Police Department: A Labor Market Analysis by Mark Bendick, PhD, 1984.
33. March 39, 1984 letter from James Sharp to the Human Relations Commission.
34. Presentation of Miles White, Chief of Police, City of Flint, Michigan.
35. Deposition transcripts of Plaintiffs, Ananich, Bugbee, Dickinson, Dicks, Hawkins, McManaman, Sanchez and Sharp.
36. Case file: *Waldron v City of Flint*
37. Case file: *Holliman v Price*
38. Case file: *Flint Police Patrolman's Association v City of Flint*
39. Case file: *Alfaro v Suber*
40. Case file: *Holliman v Price*
41. Case file: *Pizala v City of Flint*
42. Case file: *Cheatham v City of Flint*
43. Case file: *Graham v City of Flint*
44. Case file: *Miller v City of Flint*
45. Case file: *MDCR ex rel Chari Bradley v City of Flint*
46. Flint City Code
47. City of Flint EEO-4 reports for the years 1980-1991, inclusive.
48. Population/Workforce Statistical and Census Data.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION – FLINT

No. 90-CV 40148-FL
STEWART A. NEWBLATT

CHARLES MIDDLETON, W. OSMUND KELLY, III, BRIAN SEPANAK, BRUCE SEPANAK, STEPHEN HILL, GREGORY DOERR, BARRY SAUNDERS, ROBERT LOREY, MAYNARD NEWMAN, JAMES McCLELLAN, MARK CAMPBELL, and THOMAS HILGENDORF,

Plaintiffs,

-vs-

THE CITY OF FLINT, a municipal corporation, and THE FLINT POLICE OFFICERS ASSOCIATION,

Defendants.

The Deposition of MILES L. WHITE, was taken before me, Lisa F. Wolanin, CSR-3259, Notary Public, at 2483 South Linden Road, Flint, Michigan, on Wednesday, August 14, 1991, commencing at or about 1:25 P.M.

APPEARANCES:

GREGORY T. GIBBS, ESQUIRE, (P-26440)
2483 S. Linden Road
Flint, Michigan 48532

Appearing on behalf of the Plaintiffs.

MICHAEL J. KELLY, ESQUIRE, (P-41358)
G-8161 S. Saginaw Street
Grand Blanc, Michigan 48439

Appearing on behalf of the Plaintiffs.

DONNA R. NUYEN, ESQUIRE, (P-34636)
440 E. Congress, 5th Floor
Detroit, Michigan 48226

Appearing on behalf of the Defendants.

* * *

[9] first of the year, 1984, he had people from the Human Relations Commission and consulting people from a consulting firm there and outlined what his course of action – what he felt his course of action – what he wanted it to be.

Q. Do you recall what he said he wanted, he being the mayor, we're talking about, right?

A. Yes.

Q. Do you recall what the mayor said he wanted his course of action to be?

A. He didn't go beyond the fact that they were going to have a series of hearings, and he wanted a historical presentation regarding hiring and promotional practices with the emphasis on any disparate effects on minorities.

Q. Did he tell you he wanted to find out if there were disparate effects on minorities?

A. No, I don't – no, I don't think so. I don't recall that.

Q. Did Mayor Sharp proceed, at least in your mind, with the attitude that there had been disparate hiring in the past, was that his opinion at the time?

A. I don't recall any conversations with him, but I

believe he was on record publically as part of his campaign, you know, with speeches to that effect.

Q. So you had this meeting and this kind of directive was

* * *

[17] minutes ago, basically it was based on the entry percentage of minority officers going back, I believe at that time, about 30 years. There were some years we did better than others, but in general terms.

Q. Were you aware – you had been with the Police Department from 1965 to 1984, were you aware of any intentional discriminatory practices that were used against black applicants while you were at the Police Department?

A. No.

Q. Before becoming the Chief of Police, were you in a supervisory position?

A. Yes, I came up through the ranks.

Q. So when you came up, you started out as a patrol officer, is that correct?

A. Yes.

Q. Then you went to Sergeant?

A. Yes.

Q. And from Sergeant, you went to Lieutenant?

A. Yes.

Q. From Lieutenant to –

A. Deputy Chief.

Q. And from Deputy Chief to Chief, is that correct?

A. Yes.

Q. Now, while you were in the supervisory positions, were you aware of any intentional discriminatory practices

* * *

[27] successfully to exclude minorities. Can you tell me what you meant by that?

A. Well, the written exams appeared to be stumbling blocks over which they couldn't – you know, they couldn't succeed, and up until that time, the only criteria for promotion was a good service record or acceptable service record, minimum number of years to make you eligible to write the exam of service, and where you placed in percentages on the exam, and up until that time, there hadn't been a minority applicant for promotion ever placed high enough to receive a promotion, not that none had ever passed that I recall, but that –

Q. Okay, let me ask you this. From 1965 until 1984, during that period of time, was there ever a time when sergeants were hired from outside the police department?

A. No.

Q. So it was always during this period of time that the pool of applicants for the sergeant position would be from the police officers, is that correct?

A. Yes.

Q. You indicate as a result of litigation, five minority officers were promoted on September 25, 1974. Do you know which litigation that refers to? I understand it has been a long time. I'm just curious if you can tell me.

* * *

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION – FLINT

NO: 90-CV-40148-FL
JUDGE NEWBLATT

CHARLES MIDDLETON; W. OSMUND KELLY, III; BRIAN SEPANAK; BRUCE SEPANAK; STEPHEN HILL; GREGORY DOERR; BARRY SAUNDERS; ROBERT LOREY; MAYNARD NEWMAN; JAMES McLELLAN, MARK CAMPBELL; and THOMAS HILGENDORF,

Plaintiffs,

vs.

THE CITY OF FLINT, a municipal corporation, and THE FLINT POLICE OFFICERS ASSOCIATION,

Defendants.

The Deposition of *THOMAS RAYMOND BUGBEE*, taken before me, Daniel E. Ripka, CSR-2367, Notary Public, on Friday, August 16, 1991, at the offices of Ripka, Boroski & Associates, 717 South Grand Traverse, Flint, Michigan commencing at or about 9:43 A.M.

APPEARANCES:

GREGORY T. GIBBS, ESQ. (P26440)
2483 South Linden Road
Flint, Michigan 48532

Appearing on Behalf of Plaintiffs.

* * *

[10] recognized that there was a need to ensure that standard for whether or not you had people of different races applying.

Q. Now, before that position was created – we're calling it that position. I don't even know if we know the name of it, that this Carole person was in. When you were involved in either the supervision or construction of examinations or in the actual construction of examinations did you ever personally design an examination with the intent to exclude black persons –

A. Definitely not, no.

Q. – from passing the exam?

A. No.

Q. Okay. Did you ever observe anyone else in the department create an examination – When I say the department, I mean –

A. Yes.

Q. – where you were working. Create an examination with the intent to exclude black persons from passing it?

A. No.

Q. Okay. How long were you in the position of classification supervisor?

A. Approximately four to four and a half years.

Q. Okay. Classification examination supervisor, would that be it?

[11] A. Correct.

Q. Okay. In that position would you supervise this Carole, whose last name we can't remember?

A. Yes.

Q. And, in fact, she did validate examinations, or at least engage in a validation process for examinations in the police department during that time, didn't she?

A. Yes.

Q. While you supervised this individual by the name of Carole did you ever observe her engage in a process of intentionally designing or designing an examination with the intent to exclude black applicants from passing?

A. No.

I think I just remembered her name, Carole Wilcox.

Q. Okay.

A. That was C-A-R-O-L-E.

Q. After that four-and-a-half-year period were you promoted to a higher position?

A. At that point we had a change in the form of government from a city council, city manager appointed by the city council form of government to a strong mayor form of government with the election being conducted in November of 1986? No, '76? And we had our first strong mayor elected. And at that point shortly thereafter there was [12] an interim personnel director appointed named Aubrey Lynch.

Q. Aubrey, A-U-B-R-E-Y?

A. I believe so. He was a black male Ph.D. who had worked at General Motors Institute. He was there but for a short time, and then I was appointed as the personnel director.

Q. Okay. Did you act as the right-hand employee to Aubrey Lynch?

A. Yes.

Q. Were you appointed sometime in '76, or was it in '77?

A. I was appointed in '76. I think the election must have been in '75. The first strong mayor might have been '75. I was appointed in '76.

And I think during that period they changed my title to deputy personnel director while Aubrey was

there. And I was told when he was appointed on the interim basis that I would be the next personnel director.

Q. While Aubrey Lynch was there did you observe Mr. – Was it a he or a she?

A. He.

Q. – Mr. Lynch engage in any practices with respect to the construction of tests or the use of selection criteria for employment that were designed to intentionally [13] discriminate against black applicants?

A. No.

Q. And you were appointed personnel director sometime in 1976?

A. Yes.

Q. Okay. And you would have been appointed by whom?

A. I was appointed by Mayor Rutherford, James Rutherford.

Q. And you served in that capacity until 1986?

A. I served until January 1988.

Q. I'm sorry. January of '88.

Were you reappointed by different mayors?

A. I served two terms under Mayor Rutherford, and I served one term under Mayor James E. Sharp, and I was not reappointed with the current mayor, Matthew Collier.

I stayed on from when he took office in November until January simply until a replacement was found for me.

Q. And do you know the name of the individual that replaced you?

A. I can't think of it. He's now at Mott Community College, but . . .

Q. Okay. When you were appointed as personnel director what were your duties?

A. Primarily oberseeing the entire personnel system.

The first principal duty I had was to [14] develop personnel rules and regulations, because under the strong mayor form of government they disbanded – or reorganized the system. We had what is really called a civil service system prior to the strong mayor, and there was a three-member commission, Civil Service Commission that oversaw the civil service operation. And they would also hear appeals from applicants and employees. And employees it could be a range from appealing a standing on an examination, whether it could be a classification appeal, disciplinary matter. After the strong mayor form of government they split those and created the personnel department. The Civil Service Commission then became a seven-body commission adjudicatory role in hearing matters.

The personnel department – Then I had to create personnel rules and regulations, negotiate those with the six bargaining units, conduct public hearings regarding those personnel rules and regulations, but essentially oversaw the complete personnel operation, all aspects of that system, which included the – we had an employee health clinic, safety office, and at the early stages the affirmative action officer reported to the personnel director. And I had upwards of thirty some employees at one time when we had the Comprehensive Employment Training Act housed in that department, and [15] so forth.

Q. Okay. During that period of time when you served as personnel director was one of the functions of the personnel department to review, and develop, and create selection criteria for positions in the police department?

A. Yes.

Q. And that would not only be entry level positions, such as police officer, but also higher supervisory positions such as sergeants?

A. Yes.

Q. Okay. During that period of time that you served as personnel director were you aware of any practice in your department that was designed to exclude blacks from either entering into entry level positions of police officer or being promoted to the position of sergeant?

A. No.

Q. And did you advocate or did anybody in your department advocate such selection procedures?

A. No.

Q. Okay. This particular suit involves a challenge to an affirmative action program that was adopted by the City of Flint in 1984 relating to a program that required for each person promoted into the sergeant position at the police department there should be one minority person

* * *

[20] itself adversely affect candidates.

Q. And the concentration at least as to the police department with respect to selection procedures would be at every level?

A. That's correct.

Q. Entry level, it would be police officer there; is that right?

A. Yes.

Q. And then the second level, I guess, would be sergeant?

A. Yes.

Q. Okay. And then go upwards from there?

A. I think lieutenant, then captain. But we were as vigorous in doing – ensuring that our validation was acceptable at any level, whether or not we had candidates of a minority group.

Q. And that was before even this 1984 Human Relations Commissions hearing?

A. Oh, very definitely.

Q. Okay. I'm going to show you this document. It's title is Need For Affirmative Action in the City of Flint's Police and Fire Departments. It's sixteen pages in length, and it's been marked as Exhibit 1 to this particular deposition.

And what I'd like to do is take some time to review it right now. I know you've been gone from [21] the city for a while, but I'll be asking you some questions about it.

A. Okay. Could I preface whatever your questions are that I was not involved with any of the Human Relation Commission hearings, I did not attend any of the hearings, and I'm only a party to it that I was employed by the city at that time. But I'm not conversant with the specifics of the hearing, and only in general terms, you know, so . . .

Q. Okay. That's one of the questions I was going to start out with. I didn't see you as someone listed who testified from their report at least. And that's correct then, you did not testify?

A. Yes, I did not testify.

Q. Okay. Why don't you take some time anyway to just skim it, if you want, then I'll ask you some questions.

(A discussion was had off the record.)

Q. (BY MR. GIBBS): Okay. Mr. Bugbee, you already indicated that you were not involved in those hearings?

A. That's correct.

Q. So as I understand it you gave no testimony at the hearings; is that correct?

A. That's correct.

Q. You did not attend the hearings?

[22] A. I did not attend.

Q. Okay. And you were not a member of the panel

known as the Human Relations Commission?

A. That's correct.

Q. Okay. Let me ask you this, and you may or may not recall, I don't know. But wasn't the one-to-one affirmative action policy in effect before these hearings took place in April of 1984?

A. If it was it was early. Because I think we met as a panel in '83. And it could have preceded this, and I believe it did, but it – I believe we had the one-and-one by the time we had the hearings.

MS. NUYEN: Can you clarify for me what you mean by in effect? I'm not sure I understand that.

MR. GIBBS: Okay. Well, I'm going to go into it.

Q. (BY MR. GIBBS): When I say in effect I mean was it being used before the hearings in 1984?

A. I believe it was before the hearings. But it may not have been. I know it was in '83 that we met as a committee from the police department, and part of our recommendations for the negotiating team was that one-to-one. Now, whether that triggered before the commission hearings was in effect before, you know, I can't answer with any degree of certainty. I'm sure the

* * *

[25] the position of the city administration?

A. It was for a one-to-one.

Q. In terms of negotiations and the city's position, was it your responsibility to basically advocate the city's position?

A. That's correct.

Q. As personnel director?

A. That's correct.

Q. Okay. So you would know what they want?

A. Yes, very definitely.

Q. Okay. And to the best of your recollection this was advocated before these hearings?

A. Yes.

Q. Okay. And this being that one-to-one ratio; is that correct?

A. Yes.

Q. Okay. Now, you indicated you weren't involved in these. Did you know they were going on?

A. Yes. It was front page stuff, I guess, at the time.

Q. Did anyone from your department go to these hearings? They have a list on the front page here of –

A. I don't believe so. At that point the – I'm sure Louis Hawkins would have been a principal party, who was the – He was the affirmative action officer for the city. And I believe by then he was no longer a member of the

* * *

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION – FLINT

Case No. 90-CV40148-FL
JUDGE NEWBLATT

CHARLES MIDDLETON, W. OSMUND KELLY, III, BRIAN SEPANAK, BRUCE SEPANAK, STEPHEN HILL, GREGORY DOERR, BARRY SAUNDERS, ROBERT LOREY, MAYNARD NEWMAN, JAMES McCLELLAN, MARK CAMPBELL and THOMAS HILGENDORF,

Plaintiffs,

vs.

THE CITYOF FLINT, a municipal corporation, and THE FLINT POLICE OFFICERS ASSOCIATION,

Defendants.

The Deposition of JAMES A. SHARP, JR., taken before Zo Turner, CSR-2496 and Notary Public, on Monday, September 30, 1991, at the law office of Gregory T. Gibbs, 2483 South Linden Road, Flint, Michigan, commencing at or about 10:25 in the forenoon.

APPEARANCES:

GREGORY T. GIBBS, ESQUIRE (P-26440)
2483 South Linden Road
Flint, Michigan 48532

Appearing on Behalf of the Plaintiffs.

* * *

[11] in city employment, didn't you?

A. Yes.

Q. As part of a platform that you –

A. Yes.

Q. And as part of that, the need for affirmative action, you advocated the need for the use of affirmative action in the police department. Isn't that correct?

A. Yes.

Q. Now, what I'd like to try to do is confine the next series of questions to after your election in November of 1983, but before the hearings conducted by the Human Relations Commission in April of 1984.

And ask you that after you took office in November of 1983, up until April of 1984, what steps did you take as mayor of the City of Flint to implement an affirmative action program for the City of Flint Police Department?

A. Was to participate in discussions that reviewed the existing Affirmative Action Committee – Committee's activities at appropriate times and to provide input, guidance into those – those committee meetings.

Q. So what you're saying is at the time you took office there was an existing committee called an Affirmative Action Committee?

A. Yes.

* * *

[14] you recall?

A. I don't recall.

Q. Would it have been Richard Davidson?

A. I don't recall.

Q. Was Richard Davidson fire chief at some point during your administration?

A. I don't recall. I don't know that name.

Q. Did you appoint Miles White as the chief of police?

A. Yes.

Q. Did your administration have a position known as Deputy Administrator for Public Safety?

A. Yes.

Q. Did Richard Dicks hold that position?

A. Yes.

Q. And did you appoint Mr. Dicks in that position?

A. Yes.

Q. Do you remember who your affirmative action officer was in 1983?

A. Louis Hawkins.

Q. And the city attorney, do you recall who the city attorney was originally when you came into office?

A. The city attorney that I appointed was Olof Karlstrom.

Q. Was there an interim city attorney before Mr. Karlstrom?

A. I don't remember.

Q. And do you recall who the city administrator was?

* * *

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 90-CV-40148-FL
HON: STEWART A. NEWBLATT

CHARLES MIDDLETON, W. OSMUND KELLY, III, BRIAN SEPANAK, BRUCE SEPANAK, STEPHEN HILL, GREGORY DOERR, BARRY SAUNDERS, ROBERT LOREY, MAYNARD NEWMAN, JAMES McLELLAN, MARK CAMPBELL, and THOMAS HILGENDORF,

Plaintiffs,

CITY OF FLINT, a Municipal Corporation, and THE FLINT POLICE OFFICERS ASSOCIATION,

Defendants.

Michael J. Kelly (P41358)
Attorney for Plaintiffs

Gregory Gibbs (P2644)
Attorney for Plaintiffs

Terrence J. Miglio (P30541)
Donna R. Nuyen (P34636)
Attorneys for Defendant City of Flint
440 E. Congress, 5th Floor
Detroit, Michigan 48226
(313) 965-7610

RESPONSE TO PLAINTIFFS' FIRST REQUEST FOR ADMISSIONS

NOW COMES Defendant, The City of Flint, by and through its attorneys, KELLER, THOMA, SCHWARZE, DuBAY & KATZ, P.C., and in response to Plaintiffs' First Set of Requests for Admissions, state as follows:

REQUEST FOR ADMISSION NO. 1

ADMIT that the Flint Human Relations Commission ("HRC") announced its intention to hold public meetings, held public hearings, and issued its official report regarding an affirmative action plan subsequent to the date the FPOA and the City of Flint negotiated the one for one promotion addendum to the 1983-84 collective bargaining agreement.

RESPONSE TO REQUEST FOR ADMISSION NO. 1

Defendant admits that the Flint Human Relations Commission announced its intention to hold public meetings, held public hearings, and issued its official report regarding the need for affirmative action in the City of Flint's Police and Fire Departments subsequent to the date the FPOA and the City of Flint negotiated the addendum to the July 1, 1983 to June 30, 1984 collective bargaining agreement.

REQUEST FOR ADMISSION NO. 2

ADMIT that the City of Flint did not obtain prior approval from the Michigan Civil Rights Commission before implementing the one-for-one promotional affirmative action plan.

RESPONSE TO REQUEST FOR ADMISSION NO. 2

Admitted.

REQUEST FOR ADMISSION NO. 17

ADMIT that in the absence of an affirmative action plan Plaintiff Bruce Sepanak would have been number 6 on the 1989 promotional eligibility list because officers Thomas Korabik, Brian Sepanak, Maynard Newman, Barry Saunders, Lloyd Whetstone, Gregory Doerr, James McClellan and Ronald Nelson would have been promoted on 1983, 1985 and 1987 promotional eligibility lists.

RESPONSE TO REQUEST FOR ADMISSION NO. 17

Denied.

Respectfully submitted,

KELLER, THOMA, SCHWARZE,
SCHWARZE, DuBAY & KATZ, P.C.

By /s/ Terrence J. Miglio

Terrence J. Miglio (P30541)
Donna R. Nuyen (P34636)
Attorneys for Defendant
440 East Congress, 5th Floor
Detroit, Michigan 48226
(313) 965-7610

Dated: December 5, 1990

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Hon. Stewart A. Newblatt
Case No. 90-CV-40148-FL

CHARLES MIDDLETON, W. OSMUND KELLY, III, BRIAN SEPANAK, BRUCE SEPANAK, STEPHEN HILL, GREGORY DOERR, BARRY SAUNDERS, ROBERT LOREY, MAYNARD NEWMAN, JAMES McLELLAN, MARK CAMPBELL, and THOMAS HILGENDORF,

Plaintiffs,

v

CITY OF FLINT,

Defendant.

Glen N. Lenhoff (P32610)
Attorney for Plaintiffs

Michael J. Kelly (P-41358)
Co-Counsel for Plaintiffs

Terrence J. Miglio (P30541)
Donna R. Nuyen (P-34636)
Attorneys for Defendant
440 East Congress, 5th Floor
Detroit, Michigan 48226
(313) 965-7610

DEFENDANT'S AFFIRMATIVE DEFENSES

NOW COMES the Defendant, CITY OF FLINT (hereinafter referred to as "Defendant"), by and through its attorneys, KELLER, THOMA, SCHWARZE, SCHWARZE, DuBAY & KATZ, P.C., and for its Affirmative Defenses states as follows:

1. The Complaint fails to state a claim upon which relief may be granted.

2. Plaintiffs are barred from maintaining the instant action by reason of the doctrines of laches, waiver, estoppel and/or unclean hands.

3. Plaintiffs have failed to diligently mitigate their damages and, therefore, are barred from receiving all or part of the relief requested in the Complaint.

4. Plaintiffs' Complaint is barred by the applicable statute of limitations.

5. The actions or communications complained of in the Complaint are absolutely and/or qualifiedly privileged or justified pursuant to the Constitutions, statutes and common law of the State of Michigan and the United States.

6. Plaintiffs have failed to join an indispensable party to this action.

7. Some or all of the Plaintiffs lack standing to raise the claims allegedly asserted in their Complaint.

8. Some or all of the Plaintiffs have failed to exhaust their administrative and/or contractual remedies.

9. The Affirmative Action Plan adopted by the Police Department of the City of Flint was approved by the Michigan Civil Rights Commission on January 28, 1986.

10. Defendant reserves the right to assert further Affirmative Defenses upon discovery of facts not presently known.

WHEREFORE, Defendant prays that this Honorable Court dismiss Plaintiffs' Complaint in its entirety, with prejudice, and award Defendant its costs and attorney fees incurred in having to defend against same.

KELLER, THOMA, SCHWARZE,
SCHWARZE, DuBAY & KATZ, P.C.

By /s/ Terrence J. Miglio
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Dated: [Illegible], 1990.

APPENDIX H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Hon. Stewart A. Newblatt
Case No. 90-CV-40148-FL

CHARLES MIDDLETON, W. OSMUND KELLY, III, BRIAN SEPANAK, BRUCE SEPANAK, STEPHEN HILL, GREGORY DOERR, BARRY SAUNDERS, ROBERT LOREY, MAYNARD NEWMAN, JAMES McLELLAN and THOMAS HILGENDORF,

Plaintiffs,

v

CITY OF FLINT, a Municipal Corporation, and THE FLINT POLICE OFFICERS ASSOCIATION,

Defendants.

DEFENDANT CITY OF FLINT'S
MOTION FOR SUMMARY JUDGMENT

NOW COMES the Defendant, CITY OF FLINT (hereinafter the "City"), by and through its attorneys, KELLER, THOMA, SCHWARZE, SCHWARZE, DuBAY & KATZ, P.C., pursuant to Fed. R. Civ. P. 56(c), and in support of its Motion for Summary Judgment, states:

1. On May 11, 1990, Plaintiffs filed a three count Complaint alleging that the City's promotional practices for the promotion of patrol officers to the rank of sergeant violated 42 USC §1981, 42 USC §1983, and

Michigan's Elliot-Larsen Civil Rights Act, MCLA §37.-2101, *et seq.*; MSA §3.548 (101), *et seq.*

2. Based on this Court's statements at the hearing held on the City's October 9, 1991, Motion to Dismiss and for Summary Judgment, Plaintiffs' Elliott-Larsen claims will be dismissed, and their federal claims will remain, pending the filing of the instant Motion for Summary Judgment.

3. In November, 1983, the City and Defendant, Flint Police Officers Association ("FPOA") commenced negotiations on the issue, *inter alia,* of affirmative action in the promotion of patrol officers to the rank of Sergeant. These negotiations resulted in an Addendum to the collective bargaining agreement (Exhibit 1), which was ratified by the FPOA membership on January 27, 1984, and by the Flint City Council on February 1, 1984.

4. In April of 1984, the Flint Human Relations Commission ("HRC") held extensive hearings on the need for affirmative action in the Flint Police Department, and concluded that the City had discriminated against minorities in hiring and promotions which resulted in a conspicuous under-representation of minorities in all ranks of the Department.

5. Based on the findings and conclusions of the HRC, the City implemented a 1:1 promotion ratio from patrol officer to sergeant.

6. A municipality's voluntary affirmative action plan does not violate the Fourteenth Amendment of the United States Constitution if the municipality has a compelling governmental interest to implement the plan and the plan is narrowly tailored to serve that interest.

7. There is no genuine issue as to any material fact that the City had a compelling governmental interest just-

ifying implementation of the Affirmative Action Plan ("AAP" or "the Plan") since the HRC found that the City had discriminated against minorities in hiring and promotions within the Police Department and had failed to properly comply with the remedial orders of this Court regarding race discrimination since the 1970's.

8. There is no genuine issue as to any material fact that the City's AAP is narrowly tailored to serve the City's compelling governmental interest since it is flexible, limited in duration, is based on the relevant labor market and is not overly intrusive on the rights of third persons.

9. Plaintiffs' Complaint must be dismissed in its entirety because the City had a compelling governmental interest to implement affirmative action in the Police Department, the Plan is narrowly tailored to serve that interest, and the Plan, therefore, conforms to the requirements of the Equal Protection Clause of the Fourteenth Amendment.

10. This Motion is based upon the accompanying Brief in Support of Motion for Summary Judgment and all pleadings filed in this case to date.

WHEREFORE, Defendant CITY OF FLINT respectfully requests that this Honorable Court grant its Motion and enter an Order dismissing Plaintiffs' Complaint in its entirety, with prejudice, and award Defendant its costs and attorney fees incurred herein.

KELLER, THOMA, SCHWARZE,
SCHWARZE, DuBAY & KATZ, P.C.

By /s/ Donna R. Nuyen
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Dated: May 18, 1992.
WP: CMM323